86-180

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RYAN KREBS, M.D.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under *Johnson v. Zerbst*, 304 U.S. 458 (1938), a criminal defendant may prospectively, through a waiver of any "conceivable" potential conflict, knowingly and voluntarily waive his right to counsel if he is wholly unaware of the facts underlying an actual conflict of interest or of the consequences of the conflict to his right to counsel.

2. Whether the intentional concealment by the government, in violation of an explicit court order, of relevant facts concerning an actual conflict of interest by defendant's counsel violates a defendant's Sixth Amendment right to counsel.

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RYAN KREBS, M.D.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ryan Krebs, M.D., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 788 F.2d 1166 and reprinted as Appendix A in the appendix to this petition. The judgment of the district court is reprinted as Appendix B in the appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered April 18, 1986. An order denying defendant's petition for rehearing and suggestion for rehearing en banc was entered June 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner was represented at trial by a lawyer who was himself accused before the jury, by the government's principal witness, of participating in the very conspiracy

for which his client was charged. Although the circumstances raise grave questions about whether petitioner was denied his right to a fair trial, the Court of Appeals for the Sixth Circuit declined to reach these questions, holding that he knowingly and voluntarily waived his right to counsel.

The history of this case is set out in some detail in the opinion of the court of appeals. Pet. App. 1a-10a. A brief review is necessary to understand the issues in this petition. It is divided into four sections: (1) facts underlying the prosecution; (2) facts underlying the conflicts; (3) facts underlying the waiver; and (4) the opinion below.

1. *Facts underlying the prosecution.* This case involves a large-scale drug trafficking operation conceived and led by Nellie Bell Kassim, who eventually became the government's principal witness. *Id.* at 1a. In the spring of 1980, Kassim developed a plan to conceal the illegal sale of prescription drugs behind the apparently legitimate facade of medical clinics. 29 Tr. 501.[1] Although the clinics served many legitimate patients, their principal function was to conceal various illegal drug activities, the most lucrative of which involved the bulk sale of prescriptions as well as controlled substances obtained through phony prescriptions. Pet. App. 1a-2a.

Petitioner Dr. Ryan Krebs did not become associated with Kassim until the fall of 1980. A 29-year old resident in internal medicine at the University of Michigan Hospital in Ann Arbor, 50 Tr. 31, Dr. Krebs secured part-time employment at Kassim's clinic after answering a newspaper advertisement for a physician to work in a downtown Detroit medical clinic. 50 Tr. 42-43.

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[1] References to the transcript are first to the volume and then the page on which the testimony appears. Documents are cited with the prefix "R" followed by the record entry number as it appears on the docket.

According to the government's theory, Dr. Krebs did not become involved in the conspiracy until the fall of 1981, a year after he began to work part-time for Kassim. 12 Tr. 39-41; 31 Tr. 112. According to Kassim, Dr. Krebs inadvertently learned about the sale of bulk prescriptions and told Kassim that he "was ready to make money." 29 Tr. 116. Thereafter, Dr. Krebs allegedly began selling blank prescriptions to Kassim and others. 29 Tr. 117-18.

On April 28, 1982, Dr. Krebs was arrested and charged with 23 other individuals (including Kassim) and six corporations with violations of 21 U.S.C. §§ 841(a)(1) & 846. R.1.

At trial, the government's case against Dr. Krebs rested principally on the testimony of Kassim, who entered into a plea agreement before trial. Pet. App. 6a. Dr. Krebs asserted that he was manipulated by Kassim and by her confederates and that his name was used without his knowledge or consent to advance her illegal business. Pet. App. 8a. On November 22, 1982, following seven weeks of trial and twelve days of jury deliberations, Dr. Krebs was acquitted of conspiracy to possess with intent to distribute certain drugs and convicted of conspiracy with intent to distribute certain others. Pet. App. 10a. On January 7, 1983, he was sentenced to five years' imprisonment. Pet. App. 26a.[2]

2. *Facts underlying the conflicts.* Dr. Krebs was represented at trial by Kenneth M. Robinson, a Washington, D.C., attorney who had previously represented Kassim and the clinic in connection with the investigation that led to the indictment. Dr. Krebs' trial was dominated by charges that Robinson himself was a participant in the conspiracy and by his efforts to rebut them. These allega-

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[2] As sentencing, the court found that Dr. Krebs had participated in the conspiracy only from October, 1981, until January, 1982, and not the 15-month period alleged in the indictment. Transcript of Proceedings, January 7, 1983, at 7, 14.

tions were concentrated in the testimony of Kassim, but they also surfaced repeatedly during the trial, after the court ruled early in the proceedings that the truth of one particular accusation against Robinson was a proper matter for cross-examination before the jury. 14 Tr. 49. Despite this preoccupation with Robinson's guilt, the court never inquired whether Robinson was properly defending his client.

Robinson was accused of an array of offenses more serious and of longer duration than the charges against his client.[3] No summary can capture the full flavor of the proceedings. A few instances are particularly significant, however.

First, Kassim testified that the affidavits that she and Robinson executed in connection with the court's pretrial inquiry into potential conflicts arising from his prior representation, *see* p. 8, *infra*, were themselves a fraud upon Dr. Krebs and the court. According to Kassim, Robinson threatened to discredit her if she refused to waive any conflict. He promised, however, that if she agreed to execute a waiver and to lie about Dr. Krebs' involvement, he would support her in prison. 31 Tr. 21-22.

Second, Kassim alleged that Robinson had played a pivotal role in a planned drug sale in Washington, D.C.,

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[3] Robinson was alleged to have committed the following offenses: (1) subornation of perjury in the McInnis trial (12 Tr. 74.); (2) subornation of perjury in Dr. Krebs' trial (31 Tr. 21, 56); (3) future drug offenses (31 Tr. 22); (4) taping a potential witness in violation of Michigan law (37 Tr. 187-88); (5) offenses in connection with this conspiracy: (a) involvement in the sale of Dilaudid (12 Tr. 18; 31 Tr. 82, 86); (b) drug sales in his office (31 Tr. 136); (c) forgery (31 Tr. 67); (d) complicity in the overall conspiracy (31 Tr. 67); (e) sending Daniel Lebby to Dr. Krebs for a drug sale (31 Tr. 17, 19); (f) offering DEA protection to Kassim when she came to Washington, D.C., with drugs (31 Tr. 88-89); and (g) concealment of the proceeds of the conspiracy (31 Tr. 26).

that resulted in the arrest of her sister, Nancy McInnis, whom Robinson later successfully defended.[4] According to Kassim, Robinson arranged a meeting for Kassim with a prosecutor in Washington, knowing that it was a pretext for Kassim to bring drugs from Detroit. 31 Tr. 74-75. She testified that when McInnis was arrested, Robinson advised her how to conceal 4,000 Dilaudid pills she was carrying on her person so that she could pick them up later. 31 Tr. 82. This exchange followed:

> ROBINSON: All right. Now, was this 4,000 Dilaudid for me?
>
> KASSIM: Keep on Robinson. Come on.
>
> ROBINSON: Were they for me?
>
> KASSIM: Come on.
>
> ROBINSON: Are they for me?
>
> KASSIM: They was for a sale at your office. I don't know who was going to buy them.
>
> ROBINSON: Who was going to buy them?
>
> KASSIM: You told me to bring them.
>
> ROBINSON: Why didn't you try to come at me undercover?
>
> KASSIM: Well, at that time we was in cahoots together, almost. Pet. App. 9a-10a.

Third, she described in detail the central, personal role played by Robinson in the alleged bulk sale of prescriptions by Dr. Krebs to Daniel Lebby, a former client of Robinson. 31 Tr. 94-95. According to Kassim, when Lebby sought to purchase bulk prescriptions from her and Dr. Krebs, she became concerned that Lebby was an undercover agent and telephoned Robinson in Dr. Krebs' presence to ask about him. She testified on cross examination that "you said he was okay because you represented him in a case, and Dr. Krebs was afraid because he sat there and told Dr. Krebs that he was on parole.

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[4] This transaction was also incorporated as Overt Act 33 in the conspiracy charge against Dr. Krebs. R.1; Pet. App. 3a.

And Dr. Krebs gave him some scripts and money." 31 Tr. 20.[5]

Summing up her relations with Robinson over the life of the conspiracy, *see* note 3, *supra*, Kassim observed: "I made a little money. You did, too." 31 Tr. 109.

From the outset of the trial, Robinson defined the case against Dr. Krebs as turning in large part on the truth of the charges against himself. He devoted a substantial portion of his opening statement to the charges that he expected to be made against him, 7 Tr. 47-49, and, throughout the trial, remained preoccupied with his own potential liability.

In one instance, stung by the suggestion that he had tried to persuade a defense witness to testify falsely in this case, Robinson demanded that he, the witness, and the FBI agent who had interviewed her all submit to polygraph examinations, complaining that "I feel, out of an obligation to myself, being a coward, that I should put this on the record. I haven't done anything wrong, and I want to offer that invitation in a Federal Court to a Federal Judge." 14 Tr. 48-49.[6]

In closing, Robinson returned to the theme that his and Dr. Krebs' guilt or innocence were inextricably linked. His remarks invited the jury to consider the evidence against *him* in deciding whether *Dr. Krebs* was innocent or guilty: "If you believe that about me," he explained, alluding to Kassim's allegations, "then it is too bad for

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[5] In its closing argument, the government relied on this alleged incident as evidence that Dr. Krebs engaged in the sale of bulk prescriptions. 56 Tr. 88. Robinson, of course, was not available to testify on Dr. Krebs behalf; and although Lebby reportedly denied this allegation, 15 Tr. 37, 43. Robinson did not call him as a witness.

[6] The court responded: "We would rather not be involved," to which Robinson replied "I'd rather not be, too." 14 Tr. 48-49.

me and too bad for Dr. Krebs." 56 Tr. 115.[7] Robinson likewise suggested that his success as an advocate for Dr. Krebs depended upon whether the jury believed he was guilty of criminal offenses. Referring to the perjury charge levelled against him, Robinson concluded: "And its relevant, because you do have to give weight if I do that. If you believe that about me, then I have failed." 56 Tr. 117.

3. *Facts underlying the waiver.* In its opinon below, the court of appeals pointed to two instances that it characterized as "waivers" by Dr. Krebs of his right to counsel, the first in the context of a pre-trial conflicts hearing and the second based on remarks by Robinson on the day trial was to begin. Pet. App. 12a-14a.

a. The conflicts hearing. Because a number of defendants were jointly represented or had counsel who had previously represented other defendants or witnesses, on May 26, 1982, the court ordered the government to prepare a memorandum "concerning all known possible conflicts of interest between and among attorneys and clients herein." R. 201.

In its response, filed June 10, 1982, the government pointed out that Robinson might have conflicting interests preventing him from adequately representing Dr. Krebs because of his prior representation of Kassim and McInnis. The government concluded that Kassim and Dr. Krebs might have unspecified conflicting interests and that Robinson might have acquired confidential information from them both or from McInnis. Thus, the government noted, Robinson's loyalties might be divided among Kassim, McInnis, and Dr. Krebs. Pet. App. 3a-4a; R. 200.

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[7] Robinson also stressed in his closing that the question of Kassim's credibility had crucial consequences not only for Dr. Krebs, but for him as well. "[I]f you do take her word not only does Dr. Krebs have trouble, but some day I might too." Pet. App. 10a.

On June 22nd, Robinson responded with three affidavits: his own, Dr. Krebs', and Kassim's. In his own affidavit, Robinson affirmed that his present and former clients had waived any conflicts and concluded that there was "no real or potential conflict" because "[n]either person has ever admitted their guilt in this case or has implicated the other by statement or inference to counsel." Pet. App. 4a.

Kassim, in her affidavit, which she later claimed to have been fraudulently procured by Robinson, *see* p. 4, *supra*, said that Robinson was first retained in approximately December, 1980, to represent the clinic in a grand jury investigation in Washington, D.C. She asserted that "[a]t no time have I ever suggested anything to Robinson other than that I, the clinic and Dr. Krebs are totally innocent." R. 215.

Dr. Krebs' affidavit was expressly predicated on the allegedly false representations in the affidavits of Robinson and Kassim. Dr. Krebs' affidavit begins: "I . . . have read the above [affidavits], know that Robinson previously knew Ms. [Kassim] and others prior to knowing me and that any representation he previously had is waived as a conflict for any trial or appeal." Pet. App. 4a; R. 215. The waiver was limited by its terms to conflicts arising from Robinson's prior representation of Kassim, and concluded that if the court determines that Robinson "has in fact previously represented [Kassim] . . . I waive any conceivable—actual or potential—conflict." *Ibid.*

On June 24th, the district court held a hearing on the issues raised by the government concerning Robinson and other counsel in the case. 1 Tr. 4-56; Pet. App. 4a. The government reiterated its concerns about Robinson's representation of Dr. Krebs. Robinson assured the court that he had secured waivers from Kassim and Dr. Krebs. On this basis, the court addressed Dr. Krebs directly.

The court ascertained that he was aware of his right "to be represented by fully effective and fully loyal and conflict free Counsel," and that he had heard the government's concerns. After warning Dr. Krebs that "we can't know now what possible conflicts could develop," and reminding him that he could not raise the conflict issue again, the court permitted Dr. Krebs to retain Robinson. Pet. App. 4a-6a.

Shortly after the June 24 hearing, Kassim agreed to plead guilty in return for her cooperation against the other defendants, including Dr. Krebs.[8] During the twelve weeks between the conflicts hearing and the trial, the government learned that the information concerning Robinson and Kassim that was the subject of the conflicts hearing falsely portrayed the relationship between them. The trial testimony of Kassim and the FBI and DEA agents responsible for the case establishes that well before trial, Kassim made at least three significant allegations that had an obvious bearing on Robinson's ability to devote himself exclusively to the defense of Dr. Krebs.

First, Kassim alleged that Robinson had vouched personally for Daniel Lebby, one of Robinson's former clients, when Lebby sought to purchase bulk prescriptions from Kassim and Dr. Krebs. Pet. App. 6a.[9] Second, Kassim implicated Robinson directly in the events that led to the

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[8] Because the government planned to use, and in fact did use Kassim to obtain evidence in an undercover capacity, the government kept this arrangement secret. Pet. App. 6a.

[9] So seriously did the government regard this allegation that the lead agents on the case visited Lebby on two separate occasions, the second time on the weekend after opening statements in the trial; the responsible FBI agent testified that the purpose of the visit was to "confirm what Mrs. [Kassim] was telling" the government about whether Robinson "had sent [Lebby] to [Kassim's] clinic." 15 Tr. 37. Although there has never been any evidentiary inquiry into the nature and scope of the government's interest in Robinson, the court of appeals nevertheless concluded that he was not a "target" of the prosecution. Pet. App. 10a n.2.

arrest of McInnis. Pet. App. 6a.[10] Finally, Kassim had told the government before trial that she had committed perjury at the McInnis trial and that Robinson "had put her up to it." 12 Tr. 74; 31 Tr. 141; Pet. App. 6a.

Despite the court order to the government to supplement its conflicts memorandum "on a continuing basis, with all such information which may become known to the government so long as this matter is before this court," the prosecutors took no steps to inform the defendant, his counsel, or the court of these developments. Pet. App. 11a, 18a-19a.

b. Robinson's remarks. Although ignorant of the fact that Kassim was prepared to implicate Robinson in the conspiracy, counsel for another defendant, relying on Jencks material provided by the government shortly before trial, concluded that evidence of Robinson's involvement with Kassim demonstrated an actual conflict of interest. Pet. App. 7a. Accordingly, he moved on September 16 to sever the trial of his client from that of Dr. Krebs. On the day trial was to begin, he argued that there was evidence that Robinson was aware of, and perhaps had encouraged perjury by Kassim at the McInnis trial.[11] Without soliciting any response either from

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[10] Although she was to articulate a more damning version of events at trial, Kassim testified that she told the government as early as July 1st that Robinson had been aware that Kassim was bringing drugs to Washington for her meeting with him and had suggested ways for Kassim to avoid apprehension. 30 Tr. 78-80.

[11] Specifically, he alleged that (i) the government had failed to make a timely disclosure that Kassim had become a government witness; (ii) that the McInnis trial was part of the conspiracy in this case; (iii) that Robinson had proffered testimony of Kassim at the McInnis trial that mentioned Robinson as "virtually having been a witness in the case"; and, (iv) that the government failed to disclose that Kassim had committed perjury at the McInnis trial and that Robinson was aware of, and perhaps encouraged her false testimony. Pet. App. 7a.

the government or from Robinson, the court denied the severance motion as untimely. Pet. App. 7a.

While counsel was presenting his severance motion and another motion, Robinson interrupted with what he characterized as a question. Robinson stated:

> There's a possibility that Ms. [Kassim] may give testimony about me whether or not I let her commit perjury. And I want to make it clear that anything that Ms. [Kassim] wants to say about me on the stand, is fine and Dr. Krebs will waive that as an issue. If Ms. [Kassim] wants to say I'm a drug runner, or I murdered my father, she can say anything she wants. I explained to Dr. Krebs and he's willing to waive that. Pet. App. 12a.

Neither the government nor the court acknowledged this remark in any fashion or responded to Robinson's denial on behalf of "the accused"—referring in this instance to himself—that he had suborned Kassim's perjury. 4 Tr. 57.

4. *The decision below.* Plainly troubled by Robinson's behavior, the court of appeals chose nevertheless not to confront the fundamental question of whether Dr. Krebs was denied his right to a fair trial. It elected, instead, to attribute his lawyer's bizzare conduct to "unusual trial strategy," and found that the defendant "made a knowing and intelligent waiver of his right to representation by conflict-free counsel." Pet. App. 12a-14a.[12]

In finding a waiver, the opinion relied principally on the affidavit executed jointly by Dr. Krebs and Kassim. Ignoring whether Dr. Krebs had any knowledge of the true dimensions of his lawyer's conflict or the risks it entailed at the time he signed the waiver, the court focused instead on the fact that Dr. Krebs' affidavit used

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[12] The court of appeals speculated that Robinson's preoccupation with the charges against him was "an apparent attempt to establish Kassim's lack of credibility." Pet. App. 10a.

words that seemed to encompass *any* conflict, whether or not he was then aware of it. Pet. App. 12a. The panel concluded: "Even if the affidavit signed by Krebs was based on Robinson's representation that Kassim had never admitted guilt in the instant case, Krebs expressly waived 'any conceivable—actual or potential—conflict.'" *Ibid.* The relevant question, according to the court, was not whether Krebs understood the significance of risks he was undertaking by employing Robinson, but whether he understood what it meant to waive any "conceivable" conflict. Pet. App. 13a. Because the trial court had warned Dr. Krebs that "unforeseen conflicts of interest may arise," it had no trouble answering this question: "Clearly, he possessed sufficient intelligence to comprehend the import of a waiver of 'any conceivable conflict.'" Pet. App. 13a.[13]

The opinion suggests that any shortcomings in the affidavits and the hearing were cured by Robinson's statement on the day before trial that "[t]here's a possibility Ms. [Kassim] may" accuse him of wrongdoing and that "Dr. Krebs will waive that as an issue." Pet. App. 12a-13a. Although the severance motion and Robinson's remark raised only the charge that Robinson had suborned perjury at the McInnis trial, and not the more serious accusation that he had participated directly with Kassim and Dr. Krebs in the conspiracy, the court concluded that it was sufficient to put Dr. Krebs on notice "that Kassim might make accusations against [Robinson]." Pet. App. 12a-13a. According to the court, Dr. Krebs' failure to "repudiate his prior waiver" in light of this new information demonstrates that he "chose Robinson to represent him knowing that potential conflicts of interest existed." Pet. App. 14a.

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[13] The court points to the June 24th hearing, which was also conducted before any of the facts about Robinson's conflicts were known, to the same effect. According to the court, Dr. Krebs' responses to the court at the hearing evidenced a desire "to retain Robinson as his counsel, regardless of any possible conflicts that might develop in the course of the trial." Pet. App. 12a.

The court did find "inexcusable" prosecutorial misconduct in the concealment from the court of the facts of Robinson's conflict. Pet. App. 18a-19a, 22a. The court of appeals also appeared to agree that the district court breached its duty to pursue conflicts of interest of which it becomes aware, even if counsel does not. Pet. App. 12a. However, because the court of appeals held that Dr. Krebs could waive his right to counsel without any familiarity with the underlying facts or their consequences, it apparently attached no significance to the actions of the government or the court.

REASONS FOR GRANTING THE WRIT

This case presents a textbook illustration of the importance of the protections designed to safeguard a defendant's Sixth Amendment right to counsel. Although the government and the district court were well aware before trial that the defendant's lawyer was a material witness to and an alleged participant in the conspiracy for which his client was charged, the defendant never received even the barest warning about the consequences of such conflicts to his right to a fair trial. As a result, he was ambushed at trial by counsel suffering from grave and disabling conflicts of interest.

Sidestepping the lapses of those on whom this Court has placed primary responsibility for protecting a defendant's Sixth Amendment rights, the court of appeals imposed on Dr. Krebs alone the burden of comprehending the threat to his right to counsel. It held that he waived it. This result, repugnant in equal measure to settled constitutional principles and basic fairness, merits review for several reasons.

To begin with, the court of appeals has fundamentally reshaped the standard governing waivers of Sixth Amendment rights by holding that the Sixth Amendment is satisfied so long as the defendant comprehends what it means to waive prospectively any "conceivable conflict," even if he is unaware of "the relevant circumstances and

likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1969). This result is at odds with the manner in which this Court has applied the waiver standard in other Sixth Amendment contexts; and it is squarely in conflict with the decisions of at least three other circuits, which have required as a predicate to a valid waiver that a defendant be "aware of the forseeable prejudices his attorney's continued representation could entail for his trial and possible detrimental consequences of those prejudices." *United States v. Dolan*, 570 F.2d 1177, 1181 (3d Cir. 1978); *United States v. White*, 706 F.2d 506, 508 (5th Cir. 1983); *United States v. Curcio*, 680 F.2d 881, 888 (2d Cir. 1982). *See* pp. 14-22, *infra*.

The court's decision also excuses conduct inimical to the government's affirmative obligation to respect a defendant's right to counsel. The government's deliberate concealment of information central to the existence of a conflict not only violated its own obligations to a defendant, but effectively prevented the trial court from fulfilling its constitutional obligation to explore a conflict that it "knows or reasonably should know exists." *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980). *See* pp. 22-25, *infra*.

1. The Sixth Circuit has articulated standards governing the waiver of fundamental constitutional rights that conflict with those established by the Supreme Court and other courts of appeals.

A. The need to define the elements of a waiver of the right to conflict-free counsel.

Although the right to counsel free from conflicts of interest may be waived, any waiver must meet the exacting standard set out by this Court nearly a half century ago in *Johnson v. Zerbst*, 304 U.S. 458 (1938), governing the waiver of fundamental constitutional rights.[14] Al-

[14] As articulated there, and reaffirmed last Term in *Michigan v. Jackson*, 106 S. Ct. 1404 (1986) "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. at 464.

though this Court has turned often to the elements of a sufficient waiver in other Sixth Amendment contexts, *see, e.g., Faretta v. California*, 422 U.S. 806 (1975) (self-representation); *Boykin v. Alabama*, 395 U.S. 238 (1969) (guilty plea); *Von Moltke v. Gillies*, 332 U.S. 708 (1948) (guilty plea); *Brewer v. Williams*, 430 U.S. 385 (1977) (interrogation), it has never paused to give meaning to the standard in connection with conflicts of interest.[15]

Taking advantage of this gap, the Sixth Circuit has in this case set out a flanking march around *Johnson v. Zerbst*. Focusing on an affidavit executed before the defendant could have had any inkling of his lawyer's conflicts or the risks they entailed, the court of appeals found a valid waiver on the grounds that the defendant appeared to waive prospectively *any* conflict, whether or not he then understood it. The panel concluded: "Even if the affidavit signed by Krebs was based on Robinson's representation that Kassim had never admitted guilt in the instant case, Krebs expressly waived 'any conceivable —actual or potential—conflict.'" Pet. App. 12a. To satisfy the requirement that a waiver be "knowing and intelligent," it was sufficient that the trial court "alerted Krebs at the conflicts hearing that unforseen conflicts of interest may arise during trial." Pet. App. 13a.

By holding that a prospective waiver of any "conceivable" conflict is constitutionally sufficient, even if the defendant is wholly unaware of the underlying facts or attendant risks, the court has fashioned a new category of "general waiver." This species of waiver can be

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[15] This oversight hardly reflects a lack of concern by the Court for the problem of conflicts of interest. Four times in the last eight Terms, this Court has spoken at length about conflicts of interest, and in each instance has adverted to the need for hearings to determine the existence of a conflict, *see Strickland v. Washington*, 104 S. Ct. 2052, 2067 (1984); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978), or the waiver of the right to conflict-free counsel, *Wood v. Georgia*, 450 U.S. 261, 272 (1981); *Holloway v. Arkansas*, 435 U.S. at 483 n.5,

accomplished without any comprehension of the underlying facts or possible consequences so long as it can be established that the defendant "possessed sufficient intelligence to comprehend the import of a waiver of 'any conceivable conflict.'" Pet. App. 13a.

The reasoning of the court of appeals turns principles set forth by this Court upside down. While a defendant must, of course, express a waiver by "clear, unequivocal, and unambiguous language," *National Equipment Rental v. Szukhert*, 375 U.S. 311, 332-33 (1964), this Court has "emphasized that the voluntariness of a consent or an admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries," *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). Satisfying this latter element demands "an awareness of the relevant circumstances and likely consequences" of a waiver. *Brady v. United States*, 397 U.S. at 748. No amount of "voluntariness" by a defendant can offset a complete lack of familiarity with the specific consequences of a waiver to his right to a fair trial.

The court of appeals' meager formulation of "knowing and intelligent" is wholly at odds with the manner in which this Court has defined the concept in other Sixth Amendment contexts. For example, in *Faretta v. California*, 422 U.S. 806 (1975), the Court emphasized that a defendant who proposes to represent himself must understand more than the mere fact that he enjoys the right to counsel. "[H]e should be made aware of the dangers and disadvantages of self-preservation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* at 835, *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). Similarly, in the context of guilty pleas, the Court has stressed that the "fact that an accused may tell [the court] that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility." *Von*

Moltke v. Gillies, 332 U.S. 708, 724 (1948) (plurality opinion of Black, J.) Rather, "[t]o be valid such a waiver must be made with" a specific understanding of the charges, the included statutory offenses, the possible defenses and circumstances in mitigation, and "all other facts essential to a broad understanding of the whole matter." *Ibid.*

Consistent with these decisions, the Courts of Appeals for the Second, Third and Fifth Circuits, on facts strikingly similar to those here, have reached results consistent with the principles underlying *Johnson v. Zerbst* and directly contrary to the decision below. They have held that a professed desire to waive any possible conflicts is constitutionally insufficient absent a full understanding of the facts underlying a conflict and the attendant risks. *United States v. White*, 706 F.2d at 508; *United States v. Curcio*, 680 F.2d at 888; *United States v. Dolan*, 570 F.2d at 1181.

As in the case at hand, counsel for the defendant in *United States v. White* was under investigation for activity related to the crimes for which his client was charged. Like Dr. Krebs, the defendant there was "fully informed of his right" to conflict free counsel and unequivocally waived that right despite being warned by the court that unforseen conflicts might arise. 706 F.2d at 508 & n.2. Moreover, unlike Dr. Krebs, the defendant in *White* was unquestionably aware before trial that his lawyer might be implicated in the same conduct for which he was charged and "was questioned extensively by the court regarding his awareness of the existence of a conflict." *Ibid.* Nevertheless, because the court failed to "inform[] the defendant of the precise manner in which he might be prejudiced by [his lawyer's] representation," the Fifth Circuit found, relying on *Brady v. United States*, that the waiver "was thus deprived of the knowing, intelligent and voluntary nature required for the waiver of a constitutional right." *Ibid.*

Similarly, in *United States v. Curcio*, the Second Circuit rejected a purported waiver based solely on the limited concept of "knowing and intelligent" that the Sixth Circuit held to be sufficient here. In *Curcio*, the trial court held a hearing promptly in response to the government's motion under Rule 44(c), Fed. R. Crim. P., to disqualify counsel jointly representing two defendants. The court carefully advised both defendants that they had the right to conflict-free counsel, and, like the trial court here, warned the defendants "that it was impossible to predict with certainty what conflicts might arise." 680 F.2d at 883. Like Dr. Krebs, the defendants professed a willingness to waive any potential—but then unknown—conflicts. *Ibid.*

The court of appeals held this degree of understanding insufficient to satisfy the "knowing and intelligent" component of a waiver, which it characterized as "the most fundamental and difficult problem for the court." *Id.* at 888. According to the court, the Constitution demands that defendants be alerted to "the substance of the dangers of representation by an attorney having divided loyalties in as much detail as the court's experience and its knowledge of the case will permit." *Ibid.* Only then, "[i]f the defendant reveals that he is aware of and understands the various risks and pitfalls," and "that he nevertheless chooses to hazard those dangers," may a court "regard his waiver as knowing and intelligent." *Ibid.*[36]

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[16] To the same effect is the decision of the Court of Appeals for the Third Circuit in *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978). There, the court held that "[f]or a trial judge to find that a waiver is knowing and intelligent, he must be satisfied that the defendant is aware of the foreseeable prejudices his attorney's continued representation could entail for his trial, and possible detrimental consequences of those prejudices." *Id.* at 1181; *accord United States v. Poston*, 727 F.2d 734, 738 (8th Cir.), *cert. denied*, 104 S. Ct. 2179 (1984) (waiver must be "with full knowledge of the consequences" and "potential danger" of a

Neither the courts of appeals in *White* and *Curcio* nor the petitioner proposes that a defendant must understand "every possible detriment that might befall [him] as the result of a conflict in a particular case." *United States v. White*, 706 F.2d at 509; *United States v. Curcio*, 680 F.2d at 888. Such a requirement might in many instances be impossible to satisfy, even though the defendant understands "the substance of the dangers of representation by an attorney having divided loyalties." *Ibid.* If applied mechanically, it might sacrifice the defendant's right to make "intelligent and voluntary decisions about his own criminal case," *Michigan v. Mosley*, 423 U.S. 96, 109 (1975) (White, J., concurring), to the singleminded pursuit of the constitutional requirement that a waiver be "knowing and intelligent."

Rather, as we discuss *infra* at pp. 22-25, what is required is "at least some affirmative effort by the trial court to inform the defendant of the ways the conflict might operate to impact deleteriously upon the reasoned and competent presentation of his or her defense." *United States v. White*, 706 F.2d at 509.[17] If the defendant "nev-

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conflict); *United States v. Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976) (waiver must be "made with an understanding of the conflicting interests and the dangers resulting from them").

[17] As the Court of Appeals for the Second Circuit explained in *Curcio*, the duty of the trial court is to explain the substance of the dangers "in as much detail as the court's experience and its knowledge of the case will permit." 680 F.2d at 888. "Defendants need not be prescient." *Ibid.* They must simply be "aware of and understand[] the various risks and pitfalls." *Ibid.*

According to the court in *White*, in the context of a lawyer who is himself accused of complicitly in the alleged criminal conduct of his client, such an explanation might include an explication of the risks that: the lawyer might not present certain evidence or call certain witnesses for fear of incriminating himself; he would be ineligible to testify as a witness in his client's behalf; and he might resist a plea bargain for fear that his client might agree to testify against him. 706 F.2d at 509; *see also United States v. Curcio*, 694 F.2d 14, 15-19 (2d Cir. 1982) (summarizing district court inquiry after remand).

ertheless chooses to hazard those dangers, we would regard his waiver as knowing and intelligent." *United States v. Curcio*, 680 F.2d at 888. Conversely, as the Court of Appeals for the Third Circuit found in applying a similar standard in *United States v. Dolan*, 570 F.2d at 1181, "the judge may find that the waiver cannot be intelligently made simply because he is not in a position to inform the defendant of the foreseeable prejudices multiple representation might entail for him." In such a circumstance, no constitutionally valid waiver can be found. *See Cuyler v. Sullivan*, 446 U.S. at 354 n.1 (Marshall, J., concurring in part and dissenting in part).[18] Such a flexible blend of substance with procedure guarantees a standard that not only can be met, but one that, in practice, will be respected. It fairly accommodates both the government's interest in securing waivers immune to later challenge and the defendant's right to counsel.

Embracing instead the waiver doctrine articulated here by the Sixth Circuit places defendants in a nearly impossible predicament. Because the waiver of "unforeseen conflicts of interest [that] may arise," Pet. App. 13a, is at once prospective *and* abstract, it compels a defendant faced with the mere possibility of a conflict to choose between the roll of the dice occasioned by a waiver of "any conceivable" conflict or discharging his counsel of choice, without the benefit of the facts or the assessment of likely consequences needed to make such a choice well. In theory, it demands that basic decisions about fundamental rights be made on the basis of incomplete informa-

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[18] Because the court of appeals expressly found that Dr. Krebs did not—and need not have—understood the dangers arising from his lawyer's conflicts, this Court need not reach the difficult question of whether, even though a defendant waives his right to conflict-free counsel, a court nevertheless may exercise its supervisory authority to disqualify counsel subject to a conflict of interest. *See Holloway v. Arkansas*, 435 U.S. at 483 n.5.

tion. In practice, it leads inevitably to the sort of disturbing result witnessed in this case.

Perhaps recognizing these problems, the court of appeals suggests that any shortcomings in the affidavits and the June 24th hearing were cured by a remark by Mr. Robinson on the day before trial that "[t]here's a possibility Ms. [Kassim] may" accuse him of wrongdoing and that "Dr. Krebs will waive that as an issue." Pet. App. 12a-13a. According to the panel opinion, Dr. Krebs' failure to "repudiate his prior waiver" in light of this new information demonstrates that he "chose Robinson to represent him knowing that potential conflicts of interest existed." Pet. App. 13a-14a.

There is much that is flawed with this reasoning, whether Dr. Krebs' acquiescence is viewed as an independent and sufficient waiver of his right to counsel, or as a coda to the first, flawed waiver. In the first place, even if it could be inferred from Robinson's curious remark that "[i]f Ms. [Kassim] wants to say I'm a drug runner, or I murdered my father, she can say anything she wants," Pet. App. 12a-13a, that Dr. Krebs understood the *facts* underlying the conflict, there is no evidence that he understood their *consequences* to his right to a fair trial.[19] As we have already discussed, at least a basic understanding of the consequences of a conflict to a defendant's right to counsel is an essential element of a "knowing and intelligent" waiver.

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[19] Moreover, as we discuss in section two, *infra*, this assumption is unwarranted in light of the court's finding that the government deliberately concealed basic information regarding the conflict, in direct violation of the trial court's conflicts order. As the court of appeals opinion makes clear, Dr. Krebs knew, at most, that his counsel may have suborned perjury at the McInnis trial, Pet. App. 12a, but not that Kassim would also accuse Robinson of active participation in the conspiracy in a way that would make him an important witness to his own client's alleged criminal conduct. These facts only the government knew, and it concealed them.

Just as important, "courts indulge every reasonable presumption against waiver of constitutional rights," and "do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. at 464 (internal quotations omitted). This is a particularly poor instance to depart from these settled rules in order to infer a waiver from a defendant's failure to "repudiate" his lawyer in open court.[20] As the court of appeals noted, Pet. App. 4a-6a, both Robinson and the trial court expressly warned Krebs at the conflicts hearing on June 24th no less than four separate times that once having waived his right to counsel, he could not raise the issue again. Under these circumstances, anything *but* silence from Dr. Krebs would have been astounding. To infer from his silence that he "stood by his waiver," Pet. App. 13a, swims against the flood tide of common sense and constitutional precept.

B. *The need for adequate procedures to secure a waiver.*

As important as the redefinition of the standard governing waivers is the fact that the court of appeals decision has the necessary effect of narrowly circumscribing the duties of the trial court to a defendant. By limiting the court's responsibility to a simple recital of what is meant by the waiver of the right to counsel, the rule imposes a nearly impossible burden on defendants. As this Court has noted, the problems arising from conflicts of interest are complex, subtle, and elusive. *Holloway v. Arkansas*, 435 U.S. at 490; *Glasser v. United States*, 315 U.S. 60, 75-76 (1942). To leave a defend-

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[20] Indeed, in discussing the waiver of Sixth Amendment rights in the context of police interrogation, this Court last Term reemphasized that a constitutionally adequate waiver may not be found even from a defendant's active and uncoerced cooperation with police after having been advised of his right to counsel. *Michigan v. Jackson*, 106 S. Ct. at 1410-11.

ant whose counsel may be subject to a conflict to his own resources in assessing these risks—or what is worse, to the advice of the very lawyer who is subject to the conflict—would in practice virtually ensure that fundamental decisions about the right to counsel are made on the basis of inadequate information or misguided advice.[21]

In the guilty plea context, this Court has made clear that the constitution does not countenance the imposition of such a burden. There, where the analytical problems are less difficult and the defendants are presumed to have the assistance of competent, independent, and objective counsel, *see Brady v. United States*, 397 U.S. at 748 n.6, this Court has nevertheless required the active, affirmative involvement of the trial court in explaining to a defendant the risks attending a waiver of constitutional rights. *See Boykin v. Alabama*, 395 U.S. 238 (1969); *McCarthy v. United States*, 394 U.S. 459 (1969). No less is appropriate here.

In both *Wood v. Georgia*, 450 U.S. at 272 & n.18, and *Cuyler v. Sullivan*, 446 U.S. at 347, the Court concluded —without outlining specific procedures—that the constitution requires trial courts to inquire into potential conflicts of interest of which they are or should be aware. In recognition of these principles, the Courts of Appeals for the First, Second, Third, Fifth, Eighth, Tenth, and Eleventh Circuits have all adopted procedures for addressing potential conflicts of interest similar to those for accepting a guilty plea pursuant to Rule 11,

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[21] In recognition of this obvoius fact, the Courts of Appeals for the Fifth and Eighth Circuits, in circumstances far less troubling than those here, have concluded that reliance on counsel who is subject to a conflict to advise his client about the dangers of continued representation is "especially misplaced." *United States v. White*, 706 F.2d at 509; *United States v. Lawriw*, 568 F.2d 98, 104 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978).

Fed. R. Crim. P.[22] While these procedures differ in details, they all require that, where the potential conflict of interest has been explicitly raised, the trial court "actively participate in the waiver decision," *United States v. Garcia*, 517 F.2d 272, 277 (5th Cir. 1975), and "alert the defendants to the substance of the dangers of representation by an attorney having divided loyalties in as much detail as the court's experience and its knowledge of the case will permit." *United States v. Curcio*, 680 F.2d at 888. These procedures have all the benefits of clarity and certainty without imposing any significant burden on the court or counsel.[23] Moreover, as this Court emphasized in imposing similar requirements in the context of guilty pleas, such on the record inquiries facilitate review and discourage frivolous post-conviction attacks on the constitutional validity of waivers. *Boykin v. Alabama*, 395 U.S. at 244; *McCarthy v. United States*, 394 U.S. at 466, 472.

While this Court need not spell out such procedures in order to address the issues raised by this petition, this case surely presents an appropriate occasion to do so. Here, the inaction of the trial court leaves entirely to speculation the question of what the defendant in fact understood. Just as important, it left entirely in Robinson's hand the job of explaining the "complex, subtle, and

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[22] *See United States v. Romero*, 780 F.2d 981, 984 (11th Cir. 1986); *United States v. Geittmann*, 733 F.2d 1419, 1423 (10th Cir. 1984); *United States v. White*, 706 F.2d at 509; *United States v. Curcio*, 680 F.2d at 890; *United States v. Dolan*, 570 F.2d at 1181; *United States v. Lawriw*, 568 F.2d at 104-05; *United States v. Foster*, 469 F.2d 1, 4-5 (1st Cir. 1972).

[23] Because the duty of the trial court is triggered only when it knows or should know about a potential conflict, *see Cuyler v. Sullivan*, 446 U.S. at 347, these procedures are entirely consistent with this Court's holding in *Holloway v. Arkansas*, 435 U.S. at 484-86, that trial courts have no duty to initiate inquiries into multiple representation in every case.

sometimes unforseeable dangers inherent in" conflicts of interest. *United States v. Dolan*, 570 F.2d at 1181. Even if Dr. Krebs acquiesced in his counsel's actions, it is impossible to conclude, in the absence of intervention by *any* disinterested third party, that he did so knowingly and intelligently, with a full understanding of the hazards of that choice.

We are sensitive to the concern underlying the court of appeals' opinion that defendants not be permitted to pursue an "unusual trial strategy," Pet. App. 14a, without accepting the consequences of that choice. The solution to that problem, however, is not to presume from a barren record the defendant's knowing, intelligent and voluntary choice. It is rather to ensure at the time the issue is brought to the attention of the court that the defendant fully understands the risks and pitfalls attending any conflict and his right to new, conflict-free counsel, even on the eve of trial. If the defendant still chooses to proceed with his original counsel, he cannot thereafter be heard to complain.

2. Ignoring the intentional concealment by the government of facts basic to the waiver decision undermines the ability of the court to fulfill its Sixth Amendment responsibilities and violates those of the government.

It is hardly surprising, in view of the process by which it emerged, that the finding of a valid waiver by the court of appeals is flawed in more ways than one. Even if the court of appeals articulated an acceptable standard for finding a waiver, the unseemly role played by the government in procuring it warrants review.

The court of appeals found "inexcusable" misconduct, Pet. App. 22a, in the government's concealment of information about Robinson's conflicts, in direct violation of the conflicts order. Pet. App. 18a-19a. However, it ignored the implications of this misconduct for the purposes of Dr. Krebs' appeal, apparently concluding that

it was harmless in view of the standard it set for finding a waiver.

This determination, however, misapprehends the effect of the government misconduct. In three recent decisions addressing conflicts of interest, this Court has made clear that although trial courts have no duty to initiate inquiries into multiple representation in every case, *Holloway v. Arkansas*, 435 U.S. at 484-86; *Cuyler v. Sullivan*, 446 U.S. at 346-47, the trial court *does* have a duty to explore the possibility of a conflict where "the trial court knows or reasonably should know that a particular conflict exists." *Id.* at 347; *see Holloway v. Arkansas*, 435 U.S. at 484-86. "Moreover, *Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" *Wood v. Georgia*, 450 U.S. at 272 n.18 (emphasis in original).[24]

This limited allocation of responsibility to the trial court rests on the assumption that in the typical case of multiple representation, defense attorneys are "in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." *Holloway v. Arkansas*, 435 U.S. at 485, *quoting State v. Davis*, 110 Ariz. 29, 31 (1973); *Cuyler v. Sullivan*, 446 U.S. at 347. The court of appeals' decision, however, converts this observation into a license for the government to frustrate the efforts of defense counsel and the court to fulfill their responsibilities. Here, the court expressly relied on the government's cooperation in identifying potential conflicts of interest. Pet. App. 11a. It can scarcely be gainsaid that

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[24] Assuming that the waiver here is invalid, the trial court's inexplicable failure to conduct such an inquiry after the conflict became manifest merits reversal wholly apart from the effect of Robinson's conflicts on his representation of Dr. Krebs.

had the government honored the court's conflicts order in good faith, the trial court would have been far better situated, as well as far more likely, to have fulfilled its responsibilities to the defendant. We think it equally clear that if the failure of the *court* to conduct an inquiry warrants reversal where it knows or should have known of a conflict, *Wood v. Georgia*, 450 U.S. at 272 n.18, *a fortiori* the deliberate concealment by the government of the very information that would trigger such an inquiry—in direct violation of an explicit order—requires the same result.

Such a rule would hardly burden the government unfairly. Indeed, it is altogether consistent with the government's own constitutional obligations to a defendant, as well as with its ethical responsibilities. This Court has frequently noted that "[t]he Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's" right to counsel. *Maine v. Moulton*, 106 S. Ct. 477, 485 (1985); *Faretta v. California*, 422 U.S. at 839 (Burger, C.J., dissenting). In circumstances different than, but no less troubling than, those here, this Court has condemned government conduct that has the effect of interfering with a defendant's right to counsel, and, where necessary, it has erected *per se* barriers against certain types of government conduct. *See Michigan v. Jackson*, 106 S. Ct. at 1411 (interrogation); *Maine v. Moulton*, 106 S. Ct. at 479 (undisclosed electronic surveillance); *United States v. Henry*, 447 U.S. 264 (1980) (use of undisclosed police informant); *Massiah v. United States*, 377 U.S. 201 (1964) (undisclosed electronic surveillance).

The prosecutors' ethical duties are likewise clearcut. It is plain, of course, that by pursuing the representation of Dr. Krebs, Robinson violated accepted professional standards.[25] These rules, in turn, require any lawyer,

[25] The ABA Model Code of Professional Responsibility DR 5-105 (1976) requires an attorney to decline employment in circum-

including a prosecutor, "who possesses unprivileged knowledge of a violation of [a disciplinary rule to] report such knowledge to a tribunal or other authority empowered to investigate or act upon such violations." ABA Code of Professional Responsibility DR 1-103(A) (1976); *see United States v. Turkish*, 470 F. Supp. 903, 909 (S.D. N.Y. 1978).[26]

It is important to stress that the fulfillment of these obligations does not require this Court to impose on prosecutors an affirmative obligation, akin to those imposed by *Brady v. Maryland*, 373 U.S. 83 (1963), to raise any potential conflicts, however remote. By the same token, however, the government's ethical and constructional obligations should prevent it from concealing relevant information where, as here, the issue has been clearly and explicitly raised and the court has relied on the government to identify potential conflicts. Requiring the government to pay the price for its silence in these circumstances is both fair and essential if the trial court is to fulfill its duties in an informed fashion.

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stances in which "his independent professional judgment on behalf of a client will be 'adversely affected.'" *See also* ABA Model Rules of Professional Conduct 1.7 (App. Draft 1983). The Code also bars representation by a lawyer who is, or should be, a witness in a case. *See* DR 5-101(B) and DR 5-102(A); *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704, 712 (6th Cir. 1982).

[26] These requirements have been expressly incorporated into the rules for the District Court of the Eastern District of Michigan, *see* Local Rule 6(b)(4).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 83-1098, 83-1099

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RYAN KREBS (83-1098), BERNARD LEVINE (83-1099),
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Michigan

Decided and Filed April 18, 1986

Before: LIVELY, Chief Judge; WELLFORD, Circuit Judge; and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge, delivered the opinion of the court, in which LIVELY, Chief Judge, joined. WELLFORD, Circuit Judge, (p. 23) delivered a separate concurring opinion.

PECK, Senior Circuit Judge. This case involves a large-scale drug trafficking operation conceived and led by Nellie Bell Kassim. In the spring of 1980, Kassim developed a plan to conceal the illegal sale of prescription drugs behind a facade of apparent legitimacy. Kassim

operated a succession of medical clinics specializing in the treatment of obesity, but the principal function of these clinics was to conceal several illegal drug activities. Included were the sale of individual prescriptions to clinic "patients" for their own use or for resale, the bulk sale of prescriptions for controlled substances to Detroit-area drug dealers, and the sale in Washington, D.C. and Detroit of large quantities of the controlled substances themselves, obtained through phony prescriptions.

On April 28, 1982, Ryan Krebs, a licensed medical doctor, and Bernard Levine, a licensed and registered pharmacist, and twenty-seven others were indicted by a federal grand jury in the Eastern District of Michigan and charged with distribution and intent to distribute numerous controlled substances in violation of 21 U.S.C. §§ 841 and 846. Nellie Bell Kassim was also charged in a second count with conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848. Twelve defendants, including Kassim, entered a guilty plea prior to trial. Other defendants were dismissed. Ten defendants went to trial. The jury convicted four of the defendants, including Krebs and Levine, of the conspiracy. A mistrial was granted to one defendant. Five defendants were acquitted, three by the court and two by the jury. As to each convicted defendant, the jury entered a special verdict listing the specific drugs which that defendant had conspired to distribute and to possess with intent to distribute. Only Krebs and Levine appeal their convictions.

The primary issue raised by Krebs on appeal is whether his Sixth Amendment rights were violated because his counsel, Kenneth Robinson, had an actual conflict of interest which deprived Krebs of his right to effective assistance of counsel. Levine argues that he was prejudiced by the denial of his motion to sever and that severe prosecutorial misconduct deprived him of a fair trial. Prior to the indictment of the defendants in this case, Robinson

had represented Kassim and had successfully represented Kassim's sister, Nancy McInnis, on drug distribution charges in Washington, D.C. in April 1981. McInnis had been arrested at National Airport with 9,000 Preludin tablets in her possession. According to the Washington, D.C. Metropolitan Police report, McInnis testified at her bond review hearing that she was "taking 10,000 Preludin tablets to the law offices of Kenny Robinson. She said that she was going to meet her sister, Nellie Bell [Kassim], at that location, and that she was going to turn the drugs over to Bell." Kassim testified as a defense witness at the McInnis trial.

Robinson represented Kassim during the conspiracy and for a brief time after her indictment in this action. After Robinson withdrew from representation of Kassim, he was retained by Krebs. Prior to trial of this case, the court ordered the government to file a memorandum listing all the conflicts of interest of which it was aware. In its memorandum of law regarding actual or potential conflicts of interest, the government noted that Robinson had previously represented Kassim. The government stated:

> Since Nellie Bell Kassim and Ryan Krebs, M.D. may have conflicting interests, and Kenneth Robinson may have confidential information from Nellie Bell Kassim and from Ryan Krebs, M.D., there is a potential conflict of interest with respect to both Nellie Bell Kassim and Ryan Krebs, M.D.
>
> Additionally, Kenneth Robinson represented Nellie Bell Kassim's sister, Nancy McInnis, in a trial conducted during April, 1981, in Virginia. In that case, Ms. McInnis was charged with possession with intent to distribute 9,000 Preludin (75 mg.). That allegation is now alleged as Overt Act # 33 of this conspiracy. Ms. McInnis is clearly a potential trial witness. Kenneth Robinson may have been given confidential information by Ms. McInnis as well as

> by Ryan Krebs, M.D. and Nellie Bell Kassim. His loyalties may be divided among Nellie Bell Kassim, Nancy McInnis, and Ryan Krebs, M.D.

Robinson filed an affidavit in which he stated that "based on the facts presented thus far by Ms. Kassim and Dr. Krebs there is no real or potential conflict. Neither person has ever admitted their guilt in this case or has implicated the other by statement or inference to counsel." Kassim and Krebs filed a joint affidavit. Krebs stated:

> I, RYAN KREBS, M.D., have read the above, know that Mr. Robinson previously knew Ms. Bell and others prior to knowing me and that any representation he previously had is waived as a conflict for any trial or appeal. I agree in the event that a court determines that Mr. Robinson has in fact previously represented Ms. Bell, then I still prefer and desire his representation in the instant case, I waive any conceivable—actual or potential—conflict.

On June 24, 1982, a hearing was held on the conflict issue. Robinson represented that he had discussed the potential conflict of interests issue with Kassim, Krebs and Krebs' wife, "not just whether there is a potential conflict but if in fact if one would crop up later on they can't raise on appeal or at trial . . . ." The government adopted the position that because Robinson had previously represented Kassim and McInnis, he might not vigorously cross-examine them because of prior loyalties. The court addressed Krebs:

> THE COURT: Dr. Krebs, have you heard all that has been said?
>
> DR. KREBS: Yes, I have.
>
> THE COURT: Are you aware that the 6th amendment of the United States Constitution guarantees you and every defendant in a criminal case the right to be represented by fully effective and fully loyal and conflict free Counsel?

DR. KREBS: I am aware of that.

THE COURT: Are you aware that if you cannot afford Counsel this Court will appoint Counsel for you?

DR. KREBS: Yes, I am.

THE COURT: And that you have a right to such appointment or a right to represent yourself if you see fit?

DR. KREBS: Yes, I have.

THE COURT: Are you aware of the maximum possible penalties that I have just described for the crime which you are accused, that is 15 years incarceration and 25 thousand dollars fine, as well as a three year special parole term and double penalty if there's is [sic] a prior drug conviction in your past?

DR. KREBS: I'm aware of that.

THE COURT: You have heard all of the allegations of the Government and your Counsel's responses thereto?

DR. KREBS: Yes.

THE COURT: And if there is potential conflict of interest in your Counsel, do you at this time waive the effective representation which he would have given you as a subject of appeal?

DR. KREBS: Yes, I do. I wish to retain Mr. Robinson.

THE COURT: And you realize that we can't know now what possible conflicts could develop in the course of the trial, particularly involving large numbers of people?

DR. KREBS: Yes, I do.

THE COURT: But you cannot raise this as an appeal—ineffective representation of Counsel on appeal.

DR. KREBS: I'm aware of it.

THE COURT: All right then.

The court also investigated the possibility of a conflict of interest arising from the representation by attorney Robert Cohn of five of the defendants. Cohn was himself a target of the investigation in this case. The court disqualified Cohn on the basis of an actual conflict of interest between and among the defendants represented by Cohn as well as between Cohn and the defendants. The court allowed Krebs to retain Robinson as his attorney.

Shortly after the June 24 conflicts of interest hearing, Kassim agreed to plead guilty and to testify for the government against the other defendants. The government did not inform defendants' counsel of this arrangement. The FBI conducted several "debriefing sessions" with Kassim; for some of the sessions FBI reports were prepared, but for other sessions they were not. Before trial Kassim made three significant allegations to the FBI involving Robinson. First, she alleged that Robinson had assured her that Daniel Lebby was not an undercover agent when Lebby had sought to become a bulk prescription buyer. FBI agents then interviewed Lebby. Secondly, in relation to the McInnis trial, Kassim stated at trial that she had told the FBI that Robinson had been aware that Kassim was bringing drugs to Washington and he had suggested ways to avoid being caught. Finally, Kassim alleged that Robinson had encouraged her to commit perjury at the McInnis trial.

On July 7, 1982, the court ordered the government to provide Jencks Act [1] materials to defense counsel no later

[1] 18 U.S.C. § 3500.

than five days prior to trial. The court set August 9, 1982 as the motion cut-off date. On July 8, the court ordered the government to disclose all *Brady* material within fifteen days. The government released the Jencks Act material on September 8, 1982. On September 16, 1982, the day before trial began, Levine moved to sever under Fed. R. Crim. P. 14 based on the following allegations:

1) That the government failed to make timely disclosure of the fact that Kassim had become a government witness;

2) That the trial of McInnis was for possession of Preludin, and such possession was part of the conspiracy alleged in this case;

3) That Robinson had proffered testimony of Kassim at the McInnis trial which mentioned Robinson as "virtually having been a witness in the case;"

4) That the government failed to disclose the grand jury testimony of Thelma McCullough, an unindicted co-conspirator and government witness, that McInnis had been guilty and that Kassim had committed perjury at the McInnis trial with Robinson's knowledge.

Levine alleged that the new evidence from the Jencks Act materials clearly established a personal conflict of interest by Robinson, and that the government had violated the trial court's order to update the conflict of interest memorandum. The court denied the motion as untimely. Significantly, Robinson made a statement at the hearing on the motion to sever specifically indicating the possibility that Kassim might make incriminating remarks about him (Robinson) on the stand, adding that Krebs was "willing to waive that."

Krebs was present in the courtroom when Robinson made the statement; Krebs remained silent.

At trial, the government contended that Krebs, as a member of the conspiracy, wrote prescriptions for controlled substances without a legitimate medical purpose. Krebs, a physician who was completing his residency at the University of Michigan, worked part-time at Kassim's clinics from the fall of 1980 until January 1982. Krebs' defense was that he was unaware that Kassim's clinics were not legitimate businesses. Similarly, the government alleged that Levine, as pharmacist and part owner of Scotch Castle Pharmacy, filled prescriptions either for individual patients who were referred to Scotch Castle by the staff at Kassim's clinics, or in bulk quantities for Kassim. The government maintained that Levine knowingly filled prescriptions written for controlled substances without a legitimate medical purpose. Levine's defense theory was that he did not know that any of the prescriptions he filled were invalid.

In opening statement, Robinson, Kreb's attorney, focused upon Nellie Bell Kassim and her ability to manipulate people; Robinson stated that "everything she does is a con." Robinson went into detail regarding his prior representation of Kassim, his representation of McInnis, and how he had been duped by Kassim. He stated:

> She [Kassim] says I knew about the perjury and put her up to it. But we'll show you right in front of the federal judge in Alexandria, Virginia when I felt Nellie Bell was committing perjury I told the judge she's been warned about the consequences of perjury. I say this to you—I'm not on trial, I hope —but I tell it to you because if Nellie Bell will lie for over a year and manipulate the lawyer that she's trying to get to help her get out of trouble, what will she do to a naive doctor who is twenty-nine, works part-time two days a week, who thinks he's helping people.

During cross-examination of Kassim, Robinson continually questioned Kassim about the circumstances sur-

rounding the McInnis trial and about his prior representation of her. Kassim accused Robinson of vouching for Danny Lebby, who wanted to buy bulk prescriptions. Robinson and Kassim engaged in a lengthy exchange regarding the fee he had been paid by Kassim for representing McInnis. An example of some of the extraordinary questions and responses elicited by Robinson on cross-examination regarding the McInnis trial include:

> Q. You're saying I rehearsed you on perjury and I got up in front of the judge and warned you about perjury?
>
> . . . .
>
> A. You told me what to say. After you rehearsed me for five hours, I should have had it pat.

Robinson confronted Kassim with the affidavit she had signed jointly with Krebs, in which she had stated that she had never told Robinson she was anything other than "totally innocent." Kassim repeatedly responded to Robinson's line of questioning: "You knew I was guilty." Kassim also stated that Robinson had told her to have Nancy McInnis pick the bags up at National Airport because law enforcement officers were not familiar with McInnis. McInnis, of course, was arrested and 9,000 Preludin tablets were found in the bags. Kassim claimed that she had 4,000 Dilaudid tablets in her possession at the time of McInnis's arrest, and the Dilaudid was for a sale that was to occur in Robinson's office:

> Q. [Robinson] Were they [the Dilaudid tablets] for me?
>
> A. [Kassim] Come on.
>
> Q. Are [sic] they for me?
>
> A. They was for a sale at your office. I don't know who was going to buy them.

Q. Who was going to buy them?

A. You told me to bring them.

Q. Why didn't you try to come to me undercover?

A. Well, at that time we was in cahoots together, almost.

The cross-examination testimony of Kassim is replete with accusations against Robinson. Throughout the trial, Robinson emphasized Kassim's accusations against *him* in an apparent attempt to establish Kassim's lack of credibility. Robinson challenged an FBI agent to expose any charges against him, and repeatedly referred to Kassim's allegations. In closing argument Robinson, in attacking Kassim's credibility, stated: "And if you do take her word not only does Dr. Krebs have trouble but some day I might too." Krebs was acquitted of conspiracy to possess with intent to distribute four of the eight charged controlled substances; he was convicted of conspiracy to possess with intent to distribute the other four charged controlled substances.

I. CONFLICT OF INTEREST

Krebs' argument is that he was "burdened at trial with counsel laboring under grave and unmistakable conflicts of interest that seriously undermined his performance." Krebs contends that Robinson was both a potential target of prosecution as well as a material witness to events charged in the indictment.[2] Krebs asserts

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[2] Krebs' allegation that Robinson was a target of prosecution arises from the fact that a Drug Enforcement Agency agent and an FBI agent had twice questioned Daniel Lebby, whom Kassim alleged Robinson had vouched for when Lebby allegedly sought to purchase bulk prescriptions from Kassim and Krebs. Krebs' characterization of Robinson as a target of prosecution is an exaggeration; the record does not support the allegation that Robinson was actively being investigated as the trial proceeded. Similarly, Krebs contends that Robinson was a material witness because

that Robinson's performance deprived him of his Sixth Amendment right to effective assistance of counsel.

Krebs acknowledges that he signed an affidavit waiving his right to conflict-free counsel and that he reaffirmed this waiver at the June 24, 1982 hearing on the issue. He submits that his waiver was constitutionally deficient because it was not made with "sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1969) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.") Krebs states that he found himself compromised by his attorney's conflicting interests only because the court and the government breached duties to address potential conflicts of interest of which they became aware. Krebs notes that the court's order of May 26, 1982 directing the government to prepare a memorandum concerning all known possible conflicts of interest explicitly imposed upon the government an obligation to "supplement [the report] on a continuing basis, with all such information which may become known to the government so long as this matter is before the court." Krebs submits that the government violated the May 26, 1982 order by failing to disclose that Robinson was allegedly an active participant in the illicit drug transaction that resulted in the arrest of McInnis in Washington, D.C., that he may have suborned perjury in her trial, that his fees for defending McInnis had been paid by Kassim, that Kassim had advised the government that Robinson had vouched for Lebby, and that Kassim had implicated Robinson in the transportation of drugs to Washington, D.C.

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his testimony was relevant on numerous issues, including whether Krebs sold prescriptions to Lebby and on the question of Kassim's credibility and her ability to manipulate people.

In support of his allegation that the court also breached its duty, Krebs correctly states that when a trial court becomes aware of a potential conflict of interest, it is obligated to pursue the matter even if counsel does not. *See United States v. Taylor*, 657 F.2d 92, 94 (6th Cir.), *cert. denied*, 454 U.S. 1086 (1981); *United States v. LaRiche*, 549 F.2d 1088, 1095 n.5 (6th Cir.), *cert. denied*, 430 U.S. 987 (1977). Krebs contends that the court was aware before trial began that Robinson might be implicated in the conspiracy, and this knowledge gave rise to a duty of the court to explain to Krebs the implications of Robinson's conflicting interests.

For the purpose of deciding Krebs' appeal, we need not reach the issue of whether Robinson's representation of Krebs was adversely affected by an actual conflict of interest because we hold that Krebs made a knowing, voluntary and intelligent waiver of his Sixth Amendment right to conflict-free counsel. Even if the affidavit signed by Krebs was based on Robinson's representation that Kassim had never admitted guilt in the instant case, Krebs expressly waived "any conceivable—actual or potential—conflict." At the June 24, 1982 hearing, he expressed a desire to retain Robinson as his counsel, regardless of any possible conflicts that might develop in the course of the trial. Before the trial commenced, the government made available Jencks Act material which revealed that Kassim had become a government witness and also that allegations had been made that Robinson suborned perjury in the McInnis trial. The fact that Krebs was aware before trial began that Kassim might make accusations against Robinson is evidenced by Robinson's statement at the hearing on the motion to sever on the day before trial began:

> There's a possibility Ms. [Kassim] may give testimony about me whether or not I let her commit perjury. And I want to make it clear that anything that Ms. [Kassim] wants to say about me on the

> stand, is fine and Dr. Krebs will waive that as an issue. If Ms. [Kassim] wants to say I'm a drug runner, or I murdered my father, she can say anything she wants. I explained to Dr. Krebs and he's willing to waive that.

Krebs was present when Robinson made the above statement, yet he made no attempt to repudiate his prior waiver of "any conceivable—actual or potential—conflict." Krebs is a graduate of Stanford University and the University of Texas Medical School, and was completing his residency in internal medicine at the University of Michigan at the time of the indictment. Clearly, he possessed sufficient intelligence to comprehend the import of a waiver of "any conceivable conflict," and to understand the significance of Robinson's representation to the court that, even though Kassim may make accusations against counsel, Krebs stood by his waiver.[3] In *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)), the Supreme Court stated that

> waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case "upon the particular facts and circumstances surrounding that case including the background, experience, and conduct of the accused."

Here, the trial court alerted Krebs at the conflicts hearing that unforeseen conflicts of interest may arise during trial, and Krebs insisted that he wished Robinson to represent him. Later, at the hearing on Levine's motion to sever, Robinson represented to the court that he

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[3] Krebs suggests Robinson's statement that "I explained to Dr. Krebs and he's willing to waive it" is ambiguous and could have referred to waiver of evidentiary objections. We find this contention to be without merit.

had discussed with Krebs the possibility that Kassim may make accusations against him (Robinson), yet Krebs was willing to "waive that as an issue." Krebs chose Robinson to represent him knowing that potential conflicts of interest existed. The court "has long recognized the accused's right to retain counsel of his choice." *Wilson v. Mintzes*, 761 F.2d 275, 279 (6th Cir. 1985); *Linton v. Perini*, 656 F.2d 207, 208-09 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982) (the right to counsel of one's choice is guaranteed by due process as well as the Sixth Amendment). Krebs exercised his Sixth Amendment right to counsel of choice and in so doing expressly made a knowing and intelligent waiver of his right to representation by conflict-free counsel. That Robinson's unusual trial strategy did not achieve the desired result of acquittal does not allow Krebs to now invoke the constitutional right which he chose to waive.

II. SEVERANCE

Appellant Levine contends that he was prejudiced by the denial of his Fed. R. Crim. P. 14 motion to sever his trial from that of Krebs. He argues that the untimeliness of the motion was attributable to government misconduct and the prejudice resulting from the denial was so extensive that his due process right to a fair trial was violated.

This was a proper case for joinder of offenses and defendants in a single indictment because the same conspiracy is involved in the charges against Krebs and Levine. Fed. R. Crim. P. 8. Even when joinder is permissible under Rule 8, the trial court must still determine whether the danger of prejudice warrants severance pursuant to Rule 14, which provides in part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election

> or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires.

In *United States v. Dempsey*, 733 F.2d 392, 398 (6th Cir.), *cert. denied*, 105 S.Ct. 389 (1984), Chief Judge Lively wrote:

> This court may reverse a district court's denial of a motion for severance only for an abuse of discretion. *United States v. Frazier*, 584 F.2d 790, 795 (6th Cir. 1978); *United States v. Behrens*, 689 F.2d 154, 159 (10th Cir.), *cert. denied*, 459 U.S. 1088, 103 S. Ct. 573, 74 L.Ed.2d 934 (1982). As a general rule, especially in conspiracy cases, parties who are jointly indicted should be tried together. As the court stated in *United States v. Howell*, 664 F.2d 101, 106 (5th Cir. 1981), *cert. denied*, 455 U.S. 1005, 102 S. Ct. 1641, 71 L.Ed.2d 873 (1982), while a district court may order separate trials in its discretion if necessary to avoid prejudice, "the defendant has the heavy burden of showing specific and compelling prejudice resulting from a joint trial which can be rectified only by separate trials."

First, Levine acknowledges that his motion to sever on the eve of trial was made long after the August 9, 1982 motion cut-off date. He submits that his motion was timely, however, because the government failed to comply with the continuing court order to report any additional information concerning conflicts of interest.[4] Levine explains that through Kassim's debriefing statements, the government was aware of her accusations against Robinson, yet the government made no effort to inform either the court or the defendants of this potential conflict.

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[4] We do not consider the timeliness of the motion crucial to the resolution of this issue. The government's failure to update the conflicts of interest memorandum is addressed *infra* in the discussion of prosecutorial misconduct.

Moving to the merits of his argument, Levine states that the repeated allegations of Robinson's participation in the conspiracy, subornation of perjury and witness tampering distracted the jury from the relevant issues, bolstered the credibility of Kassim, the government's principal witness, and impugned the integrity of the judicial proceedings, thus violating his right to a fair trial. Levine notes that the trial took six weeks to complete and involved a massive amount of evidence. Levine urges that in light of the complexity of the trial and the nature and repetition of the accusations against Robinson, the jury inevitably was confused by Robinson's cross-examination of Kassim and distracted from the real issues. Further, Levine claims the fact that Kassim's credibility was bolstered by the exchanges between her and Robinson is evidenced by the acquittal of Maggie Curry and John Zellner, both of whom were "exonerated" by Kassim in her testimony, even though other witnesses implicated both Curry and Zellner. Levine submits that Kassim's bolstered credibility was prejudicial to him because she was the only witness who stated that he acted knowingly in filling the fraudulent prescriptions, and she was the only witness who explained tape recordings of Levine's phone conversations in a damaging manner.[5] Levine submits that severance would have been a judicially efficient and effective means of avoiding the prejudice resulting to him from Robinson's unorthodox trial tactics.

Levine has not made a sufficient showing of prejudice to establish that the district court abused its discretion. His allegations that Robinson's trial antics enhanced Kassim's credibility are undermined, as the government points out,

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[5] The wire intercept revealed that Levine frequently called Kassim's clinic. On one occasion he told L.C. Thurman, a clinic employee, that "he didn't have any" and "come back and I'll give it back to you." Another time he told an employee to tell Kassim that he was "expecting some" and Kassim could bring thirty prescriptions a day but he was going to have to "put labels on every bottle."

by the fact that the jury convicted Shirley Danner, who was also "exonerated" by Kassim. Further, the testimony of Thelma McCullough and Sidney Brickner implicated Levine personally, and Johnnie Mae Hicks implicated Scotch Castle Pharmacy in the conspiracy. The government introduced into evidence the wire intercepts and Levine's prescription records and records of his wholesale controlled substance orders.[6] The jury convicted Levine of conspiracy with regard to only three of the eight charged controlled substances. Apparently, the jury was able to "compartmentalize the evidence as it related to separate defendants in light of its volume and the limited admissibility." *United States v. Thomas*, 728 F.2d 313, 319 (6th Cir. 1984) (quoting *United States v. Gaines*, 563 F.2d 1352, 1355 (9th Cir. 1977)). Accordingly, we find that the trial court did not abuse its discretion in refusing to order separate trials.

III. PROSECUTORIAL MISCONDUCT

Levine argues that certain acts of misconduct by the prosecution, taken in their totality, deprived him of a fair trial. Specifically, Levine points to the following:

1. The failure of the government to update the conflicts of interest disclosure order when it became aware of Kassim's allegations against Robinson.

2. The government deliberately failed to preserve evidence in that the United States Attorney's office directed the FBI not to prepare standard 302 investigation reports, used in connection with the debriefing of witnesses, on some of the interviews with Kassim.

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[6] The government produced a witness who testified that Scotch Castle Pharmacy had placed so many orders for an excessive amount of Preludin that the wholesaler, Generic Drug Company of Hollywood, Florida, finally refused to fill any more of Scotch Castle's orders.

3. The failure of the government to make a timely disclosure of *Brady* material. *Brady v. Maryland*, 373 U.S. 83 (1963). On the final day of Levine's case-in-chief, the government disclosed for the first time that an undercover agent had worked for a short time at Scotch Castle Pharmacy and had not seen any illegal activity.

4. The prosecution deliberately elicited inadmissible testimony in violation of a court order. Arthur Hayes, a witness, was inadvertently allowed to listen to trial testimony in violation of a sequestration order. The court ruled that Hayes could still testify, but that his testimony would be limited to the facts contained in a prior statement he had made. That statement did not refer to Scotch Castle Pharmacy; nevertheless, the prosecution elicited testimony from Hayes that Scotch Castle Pharmacy had filled his illegal prescriptions.

5. The government improperly vouched for the credibility of Kassim, based upon remarks by the Assistant United States Attorney in closing argument to the effect that Kassim had told the truth in her testimony because she had no motive to lie.[7]

The government, in response to Levine's first allegation, states that Kassim did not make accusations against Robinson in her initial debriefing sessions, but made the accusations at later sessions. The government suggests that it did not update the conflicts of interest memorandum because it did not take the allegations seriously. Nonetheless, the court order placed a continuing obliga-

[7] Levine also claims that the prosecution intentionally elicited an inadmissible hearsay identification of "Bernie" as the person who filled illegal prescriptions. The transcript shows that the witness's mention of "Bernie" was not in response to any question by the prosecution, but was blurted out by the witness after a hearsay objection by the defense counsel.

tion upon the government to update the memorandum; it was the function of the court, not the prosecution, to determine whether Kassim's accusations evidenced a conflict of interest. The government urges that any failure to disclose on its part would not require reversal of Levine's conviction.

The government next addresses Levine's allegation that it subverted the Jencks Act by not requiring FBI 302 reports for every witness interview. The reason given at trial for the failure of the FBI to comply with its standard procedure was that the reports were not prepared in an effort to save time. The Jencks Act requires the government to disclose to the defense prior statements of a witness. The government submits that the Jencks Act does not require the taking of notes or the preparation of FBI 302 reports, but requires only that if such notes or reports do exist, the government must disclose these prior statements to the defense. In this case, not only did the FBI not prepare 302 reports on some witness interviews, but the government failed to provide defense counsel with all of the handwritten notes from Kassim's interviews until the existence of such notes was revealed by an FBI agent's testimony at trial.

Next the government turns to Levine's assertion that it failed to make timely disclosure of *Brady* material. The government acknowledges that it failed to inform Levine's counsel until near the conclusion of the presentation of his defense that an undercover agent worked at Scotch Castle Pharmacy for two days and never saw Levine engage in illegal activity. At trial, the government stipulated that an undercover officer worked at the pharmacy on August 19 and 20, 1980, and never observed Levine filling multiple prescriptions. The parties further stipulated that Levine's counsel was not provided with this information until that morning. The stipulation was read to the jury. The government offered to make the undercover agent available as a defense witness, but Levine declined. In closing argument, Levine's counsel referred

to the failure of the undercover agent to observe any illegal activity. When asked at oral argument why the government failed to make timely disclosure of this information, the Assistant United States Attorney replied: "We forgot." The government submits that the disclosure did not come too late to deprive Levine of a fair trial, and the untimely disclosure was rendered harmless by the stipulation read to the jury and by Levine's closing argument.[8]

Levine's next complaint is that the government improperly elicited from Arthur Hayes the statement that he had taken prescriptions to Scotch Castle Pharmacy. The trial court considered this an intentional violation of its order limiting Hayes' testimony to his prior statement, which contained no mention of Scotch Castle Pharmacy, and struck Hayes' entire testimony. We are inclined to agree with the trial court that Hayes' response was intentionally elicited by the prosecution's open-ended question: "Do you remember any other places she [Kassim] told you where to go?" We also find merit in Levine's contention that the failure to timely disclose this *Brady* material obstructed his ability to prepare for trial and undermined his ability to present his theory of defense.

Finally, we turn to Levine's allegation that the government improperly vouched for the credibility of Kassim by suggesting to the jury in closing argument that Kassim had told the truth. The government urges that such statements were permissible because Kassim's credibility had repeatedly been attacked by the defense. A United Stats Attorney, as representative of a sovereignty, not only has the responsibility of prosecuting with vigor, but

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[8] The government suggests that the *Brady* material in question was not admissible evidence, citing *United States v. Qaoud*, 777 F.2d 1105 (6th Cir. 1985) (certain negative exculpatory evidence found to be inadmissible). Whether or not the evidence was properly admissible is relevant to the question of whether the outcome of the trial was materially affected, but inadmissibility does not excuse prosecutorial misconduct.

"[i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935). United States Attorneys are "held to a higher standard of behavior" than other attorneys. *United States v. Young*, 105 S.Ct. 1038, 1052 (1985) (Brennan, J., concurring in part, dissenting in part). This court has often stated that "it is improper for a prosecuting attorney in a criminal case to state his personal opinion concerning the credibility of witnesses or the guilt of a defendant." *United States v. Daniels*, 528 F.2d 705, 709 (6th Cir. 1976).

The Assistant United States Attorney made the following statements in her closing argument: "But I want to suggest to you that in this trial testimony she [Kassim] was telling the truth . . . . Basically, she had no reason to lie," and "she is basically telling the truth in this case because she has no reason to lie . . . ." Although the prosecutor's statements "I want to suggest . . . ." arguably may not express a personal opinion, *see United States v. Stulga*, 584 F.2d 142 (6th Cir. 1978) (Prosecutor's use of the words "I submit" is not equivalent to "I believe"), the effect of the two statements when considered together can be "reasonably construed to be based on personal belief . . . ." *United States v. Bess*, 593 F.2d 749, 756 (6th Cir. 1979). In the instant case, defense counsel objected to the prosecuting attorney's statements, and the trial judge responded that it would cause additional harm if she told the jury the prosecutor had "no business saying she told the truth."

We are convinced that several instances of prosecutorial misconduct occurred in the trial of this action. "To warrant a new trial, however, prosecutorial misconduct 'must be so pronounced and persistent that it permeates the entire atmosphere of the trial.' *United States v. Lichenstein*, 610 F.2d 1272, 1281 (5th Cir.), *cert. denied sub nom., Bella v. United States*, 447 U.S. 907, 100 S.Ct. 2991,

64 L.Ed.2d 856 (1980), quoting *United States v. Blevins*, 555 F.2d 1236, 1240 (5th Cir. 1977), *cert. denied*, 434 U.S. 1016, 98 S.Ct. 733, 54 L.Ed.2d 761 (1978)." *United States v. Thomas*, 728 F.2d at 320. We must determine whether, in the exercise of our supervisory powers, Levine's conviction should be reversed because of the improper conduct of the prosecutor. "In making this determination we consider whether on this record the misconduct can be said to be harmless," *United States v. Leon*, 534 F.2d 667 (6th Cir. 1976), and we so conclude.

Although the wire intercepts were susceptible of multiple interpretations, other evidence demonstrates that Levine knowingly participated in the conspiracy. The evidence established that he ordered excessive amounts of Preludin and Talwin, and that he filled controlled substance prescriptions presented in bulk. Testimony established that Levine charged amounts substantially over the regular retail price to fill prescriptions prescribed by doctors from Kassim's clinics. Kassim testified that Levine filled multiple prescriptions for Preludin and other controlled substances for her on numerous occasions. Sidney Brickner testified that while he was a Scotch Castle employee he observed Levine accept 20-30 Preludin prescriptions at one time. Thelma McCullough testified that she filled multiple controlled substance prescriptions obtained from Kassim's clinic at Scotch Castle Pharmacy on numerous occasions.

Although we think that the conduct of the prosecutor in this case was inexcusable, we do not find the facts present a clear and compelling case for reversal given the substantial evidence of guilt and the efforts of the trial court to take corrective measures to eliminate the resulting prejudice.

Accordingly, the convictions of Krebs and Levine are affirmed.

WELLFORD, Circuit Judge, concurring. I agree entirely with Judge Peck's analysis and conclusion in this case as to defendant Krebs. I write separately with regard to part III of the decision pertaining to prosecutorial misconduct and defendant Levine. The failure of the United States Attorney to furnish Levine's counsel with all the handwritten F.B.I. notes from interviews with key witness Kassim is, in and of itself, at least a disturbing oversight. When one couples that with the failure without any adequate explanation to make a timely and appropriate *Brady* disclosure that an undercover agent worked at Levine's pharmacy and observed no illegal activity on his part, this conduct becomes more disturbing. In addition, moreover, there was the questioning of witness Hayes in a fashion that brought forth testimony exceeding the bounds of a prior limiting order. The trial court struck this testimony and therefore cured to a considerable extent any resulting prejudice to Levine. Finally, as noted by Judge Peck, there was the questionable "vouching" for the credibility of witness Kassim in closing argument by the prosecutor.

These actions, in combination, cause one serious concern with respect to the contention of defendant Levine that he did not receive a fair trial. Although the question is a close one, I concur with the conclusion that the actions of the trial court were sufficient, but barely sufficient, to overcome these shortcomings and the negligent conduct of the prosecution. Despite these problems I believe Levine had a reasonable opportunity to present his case to the court and jury, and that there was substantial evidence of guilt to warrant the verdict finding Levine guilty as charged.

I would therefore also affirm as to defendant Levine but with some considerable trepidation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-1098/9

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RYAN KREBS, M.D. (83-1098),
BERNARD LEVINE (83-1099),
Defendants-Appellants

Filed June 6, [1986]

Before: LIVELY, Chief Judge, WELLFORD, Circuit Judge and PECK, Senior Circuit Judge

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal No.: 82-80242(3)
(Taylor, J.)

UNITED STATES OF AMERICA,
Plaintiff,

v.

NELLIE BELL KASSIM, *et al.*,
Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date

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☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Kenneth Robinson

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE, ☐ NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of

☐ NOT GUILTY, Defendant is discharged

☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of Conspiracy to Possess with Intent to Distribute Controlled Substances in violation of 21:USC:846

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 5 years.

SPECIAL CONDITIONS OF PROBATION

IT IS FURTHER ADJUDGED AND ORDERED that a stay of execution be granted pending designation of institution at which time the defendant shall report directly to said designated institution. Bond is continued.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant

and revoke probation for violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends:

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by

☒ U.S. District Judge

☐ U.S. Magistrate

/s/ Anna Diggs Taylor
ANNA DIGGS TAYLOR

Date 01 07 83